

WHAT DOES WEBSTER MEAN?

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INTRODUCTION

In *Webster v. Reproductive Health Services*,¹ the Supreme Court settled a tiny fraction of abortion law, but it did so in a way that unsettled the greater part of the matter. Some argue that *Webster* overruled *Roe v. Wade*,² and yet others proclaim that *Webster* was merely a funding case with little precedential value for abortion litigation and legislation. Still others predict dire consequences for civil and contraceptive rights, and the lives of expectant women.

Clearly, the Supreme Court is well on the way to a new constitutional analysis for abortion jurisprudence, but what does *Webster* mean? Justice Oliver Wendell Holmes declared that the state of the law was only a prediction of what a court would decide when confronted with a given set of facts.³ Applying this Legal Realism insight to analyze predictively⁴ what five Justices have now said concerning abortion jurisprudence, it is evident that *Roe* and its progeny are de facto overruled.

The result, however, portends none of the dire consequences promised by abortion proponents. Rather, *Webster* demonstrates that the Supreme Court will once again honor the text and history of the Constitution, and at the same time consider the rights and interests of all human beings, born and unborn.

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The authors gratefully acknowledge the research and writing assistance of David R. Salyer.

¹ 109 S. Ct. 3040 (1989).

² 410 U.S. 113 (1973).

³ See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

⁴ Even strong *Roe* supporters like Professor John A. Robertson acknowledge the breadth of *Webster* using this predictive approach. See Robertson, *The Future of Early Abortion*, A.B.A. J., Oct. 1989, at 73; Robertson, *Gestational Burdens and Fetal Status: Justifying Roe v. Wade*, 13 AM J. L. & MED. 189 (1987) [hereinafter Robertson, *Gestational Burdens*].

I. WEBSTER MEANS THAT *ROE V. WADE* AND ITS PROGENY ARE DE FACTO OVERRULED

After *Webster*, several changes in abortion jurisprudence are immediately apparent. First, the Court struck down none of Missouri's abortion regulations. This new willingness to uphold state regulation of abortion is a marked change from the extreme positions taken by the pro-*Roe* majority in *Thornburgh v. American College of Obstetricians & Gynecologists*.⁵ Second, Justice Blackmun's new role marks *Webster* as a watershed case. Blackmun authored the *Roe* opinion as head of a solid, activist majority. Now, Justice Blackmun is the dissenter.

The opinions of five Justices suggest other changes in abortion jurisprudence, but essentially they predictively proclaim: *Roe* is dead. The de facto overruling of *Roe* is evidenced in five fundamental ways.

A. Five Justices Have Now Declared A Willingness to Reconsider and Formally Overrule All or a Substantial Portion of *Roe v. Wade*

Because the Court has not explicitly overturned *Roe*, there will be debate at legislative hearings as well as in the courts over the state of *Roe*. Some doubters will want the Court to use the precise phrase "*Roe* is overruled" before they act, but for the first time since 1973, the formal, express reconsideration of *Roe* awaits only the right case.

Four Justices—Chief Justice Rehnquist, and Justices White, Scalia, and Kennedy—reconsidered *Roe*, at least in part, in *Webster*. Justice O'Connor did not believe *Roe* to be sufficiently implicated for

⁵ 476 U.S. 747 (1986). *Thornburgh* was the high-water mark in the Supreme Court's restriction of state abortion regulations. The case signaled both the extremes to which the *Roe* majority would go, and the rapidly eroding support for *Roe*. See Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. PUB. L. 181, 211-18 (1989). Chief Justice Burger's dissent illustrated both of these aspects. In it, he left the majority and called for reconsidering *Roe*. After noting *Roe*'s acceptance of the compelling state interests in maternal health and unborn life, he remarked: "Yet today the Court astonishingly goes so far as to say that the State may not even require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure" *Thornburgh*, 476 U.S. at 783 (Burger, C.J., dissenting). Pennsylvania enacted its provisions, he added, "on the mistaken assumption that this Court meant what it said in *Roe* concerning the 'compelling interest' of the states" *Id.* at 784 (Burger, C.J., dissenting). Burger's defection reduced the *Roe* majority further from its seven to two high in *Roe* to five to four.

reconsideration in *Webster*, preferring to avoid a decision on constitutional issues by statutory construction.⁶

However, Justice O'Connor has already reconsidered *Roe* herself, and called for the Court to do so, in *Akron v. Akron Center for Reproductive Health*.⁷ Although she did not believe *Webster* to be a proper case for reconsideration, when such a case comes before the Court she may be expected once again to reconsider *Roe*.⁸

B. *The Unduly Burdensome Test Has Become the De Facto Standard of Review in Abortion Jurisprudence*

In *Webster*, four Justices—Chief Justice Rehnquist and Justices White, Scalia, and Kennedy—went farther in reconsidering *Roe* than did Justice O'Connor, the fifth member of the new working majority. The result is that Justice O'Connor's views are now the lowest com-

⁶ Logically, when a plaintiff brings a case on the basis of a right or an analysis created in a prior case, the prior case is *ipso facto* sufficiently implicated for reconsideration because the real issue is what the Constitution, not precedent, requires. The precedent is the nexus between the Constitution and the case at bar. As a result, logic and sound adjudication always require the Court to determine whether the precedent still accurately interprets the Constitution.

Patterson v. McClean Credit Union, 109 S. Ct. 2363 (1989), decided just last term, demonstrates this point. In *Patterson*, the same working majority that plenary decided *Webster* reconsidered *Runyon v. McCrary*, 427 U.S. 160 (1976). The majority's action was appropriate because *Runyon* created the right under which the *Patterson* plaintiffs brought their case (*Runyon* held that 42 U.S.C. § 1981 encompassed private contracts). By the same logic, *Webster* provided a proper occasion for reconsidering *Roe*.

⁷ 462 U.S. 416, 458-59 (1983) (O'Connor, J., dissenting). In her *Akron* dissent, Justice O'Connor reconsidered *Roe* even though the parties had not asked her to do so, a fact which she noted. See *id.* at 452 (O'Connor, J., dissenting). Likewise, in *Patterson*, no party called for the reconsideration of *Runyon* in which Justice O'Connor joined, a point duly noted by the dissent. See *Patterson*, 109 S. Ct. at 2380 (Brennan, J., dissenting). Thus, Justice O'Connor's intimation in *Thornburgh* that a party must ask before reconsideration may occur is inconsistent with positions she has taken previously.

To the extent Justice O'Connor relied upon her unduly burdensome test in *Webster*, 109 S. Ct. at 3063, she was directly "implicating" *Roe* because the *Akron* Court held this test unconstitutional under *Roe*. See *Akron*, 462 U.S. at 420 n.1. Therefore, by relying on this test to uphold the Missouri statutes in *Webster*, Justice O'Connor overruled *Roe* itself.

⁸ Justice O'Connor's individual reconsideration of *Roe* in *Akron* and her commentary in *Webster* both demonstrate her low threshold for reconsideration. In *Webster*, she indicated that if the plaintiffs appealed only the first sentence of the Missouri viability testing provision, they might have implicated *Roe* enough for reconsideration. See *Webster*, 109 S. Ct. at 3061 (O'Connor, J., concurring in part). This view is readily confirmed by her agreement to reconsideration of *Runyon*, discussed *supra* notes 6-7.

mon denominator of the majority and, therefore, her views best predict the current state of abortion law.

In *Akron*, Justice O'Connor declared the "unduly burdensome" or "absolute obstacle" standard to be a necessary threshold test when reviewing abortion regulations.⁹ This inquiry would largely replace the compelling interest standard of review, except in cases of absolute obstacle to or "severe limitation" of the abortion right.¹⁰ The *Akron* Court, however, specifically addressed this unduly burdensome test and rejected it.¹¹ The Court observed that this test would largely displace the compelling interest test and would allow numerous abortion regulations which could not withstand the more stringent standard.¹² Justice Powell, writing for the Court, observed that "the dissent does not think that even one of the numerous abortion regulations at issue imposes a sufficient burden on the 'limited' fundamental right."¹³ The *Akron* Court expressly held that the unduly burdensome test was in direct derogation of *Roe*:

In sum, it appears that the dissent would uphold virtually any abortion regulation under a rational-basis test. It also appears that even where heightened scrutiny is deemed appropriate, the dissent would uphold virtually any abortion-inhibiting regulation because of the State's interest in preserving potential human life. This analysis is wholly incompatible with the existence of the fundamental right recognized in *Roe v. Wade*.¹⁴

Because the absolute obstacle test is now the de facto standard of review, two results are logically compelled. First, *Akron* is overruled because under the absolute obstacle test Justice O'Connor would have upheld all of the *Akron* provisions. Likewise, *Thornburgh*, which dealt with abortion regulations less burdensome than *Akron*'s and which Justice O'Connor also would have upheld under her absolute obstacle test, is overruled. Second, because the Court held the absolute obstacle test was in direct derogation of *Roe*, adopting this test logically overrules *Roe*.

⁹ See *Akron*, 462 U.S. at 461-66 (O'Connor, J., dissenting).

¹⁰ See *id.* (O'Connor, J., dissenting).

¹¹ See *id.* at 420 n.1.

¹² See *id.*

¹³ *Id.*

¹⁴ *Id.* (citations omitted). In view of the *Akron* holding, Justice O'Connor's joint assertion in *Webster* that the Missouri statutes were not unduly burdensome and that neither *Roe* nor any of its progeny conflicted with this opinion is untenable. By relying on the unduly burdensome test to uphold statutes she is either derogating *Roe* or overruling *Akron*.

In *Thornburgh*, Justice O'Connor set forth the new, reigning analysis for courts to use when reviewing abortion regulations:

The State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist throughout pregnancy. Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of these compelling interests, with heightened scrutiny reserved for instances in which the State has imposed an undue burden on the abortion decision. An undue burden will generally be found in situations involving absolute obstacles or severe limitations on the abortion decision, not wherever a state regulation may inhibit abortion to some degree. And if a state law does interfere with the abortion decision to an extent that is unduly burdensome, so that it becomes necessary to apply an exacting standard of review, the possibility remains that the statute will withstand the stricter scrutiny.¹⁵

While it remains to be fully developed in subsequent decisions, the absolute obstacle test would apparently uphold many state abortion regulations that the pro-*Roe* majority struck down. Among these are laws structuring the informed consent dialogue between a physician and abortion patient;¹⁶ statutes mandating judicial consideration of paternal rights; laws expanding parental rights when minors consider abortion; limitations on gender-selective abortions; limitations of abortion for social rather than maternal life or health reasons; and regulation of the mode and standard of care for abortion to promote survival of aborted children where possible.

C. *There Is No General, Fundamental Right to Abortion*

Webster also signalled an evaporation of majority support for a general, fundamental, constitutional right to abortion by rejecting Justice Blackmun's characterization of a woman's abortion interest as a "limited fundamental Constitutional right."¹⁷ The three-Justice *Webster* plurality demoted the former fundamental right to a liberty interest under the fourteenth amendment,¹⁸ and therefore states

¹⁵ *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting, joined by Rehnquist, J.) (internal quotation marks and citations omitted).

¹⁶ These might include requiring explanations and literature on fetal development, alternatives to abortion, and potential undesired physical and psychological sequelae.

¹⁷ *Webster*, 109 S. Ct. at 3076 (Blackmun, J., dissenting).

¹⁸ See *id.* at 3058 (plurality opinion).

now need only show that their regulatory scheme is rationally related to a legitimate state purpose. States will easily meet this rational basis test by asserting their compelling interests in maternal health and unborn human life.

Similarly, Justice Scalia's call for a plenary overruling of *Roe*¹⁹ logically rejects a fundamental right to abortion, raising the count to four Justices in this camp.

Justice O'Connor also agrees that there is no general fundamental right to abortion, a position evident from her advocacy of the rational basis test as the appropriate standard of review in most abortion cases.²⁰ Where abortion regulations impose an absolute obstacle or a severe limitation to performing abortions, she might find that a fundamental right exists. At least, she says, she would employ heightened scrutiny.²¹ Even where she would apply the heightened scrutiny, Justice O'Connor observes that the compelling interests of the state might prevail.²²

A simple enumeration of these views indicates that a majority of the Supreme Court no longer believes the Constitution provides a general, fundamental right to abortion. As a result, they will use a rational basis test to review abortion legislation.

D. *To the Extent Any Abortion Right Is Recognized, The Trimester Scheme Is Defunct and States Have Compelling Interests in Unborn Life and Maternal Health Throughout Pregnancy*

In *Thornburgh*²³ and *Akron*,²⁴ Justice O'Connor attacked the *Roe* trimester scheme.²⁵ She wrote in her *Thornburgh* dissent, "I . . .

¹⁹ See *id.* at 3064 (Scalia, J., concurring).

²⁰ See *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting).

²¹ See *id.* (O'Connor, J., dissenting). In *Akron*, Justice O'Connor wrote: "Even assuming that there is a fundamental right to terminate pregnancy in some situations, there is no justification in law or logic for the trimester framework . . ." *Id.* at 459 (O'Connor, J., dissenting) (emphasis added). Justice O'Connor has not explained the scope of an absolute obstacle or severe limitation test, but she obviously approved of the regulations struck down in *Akron* and *Thornburgh*. The future will tell, though, whether her notion of absolute obstacles and severe limitations provides fundamental right protection for only those burdens threatening the life of the mother, or includes those imposed by the so-called "hard" cases of rape, incest, and severe fetal deformity, or whether it encompasses burdens of less severity.

²² See *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting).

²³ 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting).

²⁴ 462 U.S. 416, 453-61 (1983) (O'Connor, J., dissenting).

²⁵ In *Roe*, the Court declared that the states' interest in maternal health becomes compelling at approximately the end of the first trimester and the states' interest in "potential" life becomes compelling at viability. See *Roe*, 410 U.S. at 163.

remain of the views expressed in my dissent in *Akron*. The State has compelling interests in ensuring maternal health and in protecting potential human life . . . throughout pregnancy.”²⁶ In *Akron*, she declared that the trimester scheme “cannot be supported as a legitimate or useful framework.”²⁷ She also observed in *Akron* that medical technology inevitably would push back the point of viability (toward conception) and move forward (toward term) the line between first and second trimester (where abortions are statistically safer for the woman than carrying a pregnancy to term). Because of this, she declared, “[t]he *Roe* framework . . . is clearly on a collision course with itself.”²⁸

Similarly, in *Webster*, Chief Justice Rehnquist and Justice White reiterated their long-standing antipathy to the trimester scheme, and Justice Kennedy joined.²⁹ They reconsidered the trimester scheme in *Webster* and effectively overruled that part of *Roe*. They declared that state compelling interests in maternal health and unborn life exist throughout pregnancy.³⁰

²⁶ *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (citation omitted).

²⁷ *Akron*, 462 U.S. at 454 (O'Connor, J., dissenting).

²⁸ *Id.* at 458 (O'Connor, J., dissenting). Recent reports that technological advancements could push back the age of viability vindicate Justice O'Connor's position. In *Webster*, an amicus curiae brief declared, “The point of viability has not changed significantly since 1973 and such change is not likely to occur in the foreseeable future.” Brief of Amici Curiae 167 Distinguished Scientists and Physicians, Including 11 Nobel Laureates, In Support of Appellees at 9, *Webster*, 109 S. Ct. 3040 (No. 88-605). According to these amici, viability is not possible at less than about 24 weeks primarily because of immaturity of the lungs, which is “the most important determinant.” *Id.* at 10. They conclude, “There are no medical developments anticipated in the foreseeable future that would bring about adequate fetal lung function prior to 23 to 24 weeks of gestation.” *Id.* at 11. Countering this pessimistic and myopic view of technological possibilities are recent reports of the use of oxygenated liquids to allow premature lungs to breath perhaps as early as 20 weeks. See *For Babies, 'Liquid Air' May Spare Fragile Lungs*, N.Y. Times, Aug. 29, 1989, at C3, col. 4.

Justice Blackmun resorted to revisionist history in *Webster* in attempting to show that no progress has been made in lowering viability between *Roe* and *Webster*. In *Roe*, he said that “[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.” *Roe*, 410 U.S. at 160. In *Webster* he declared that “the threshold of fetal viability is, and will remain, no different from what it was at the time *Roe* was decided. Predictions to the contrary are pure science fiction.” *Webster*, 109 S. Ct. at 3076 n.12 (Blackmun, J., dissenting) (citing Brief for a group of American Law Professors). However, this immovable viability line, trumpeted by Blackmun and the Amicus Curiae mentioned above, is “23 to 24 weeks,” Brief of Amicus Curiae, *supra*; *Webster*, 109 S. Ct. at 3075-76 n.9 (Blackmun, J., dissenting), not the 28 weeks declared “usual” in *Roe*. Thus, Justice Blackmun's line is immovable only if seen through the smoke and mirrors of revisionist history.

²⁹ See *Webster*, 109 S. Ct. at 3057 (plurality opinion).

³⁰ See *id.* at 3055.

Because Justice Scalia called for the plenary reversal of *Roe* in his *Webster* concurrence, it is reasonable to assume that he also would approve dismantling the trimester scheme.³¹ To the extent some fundamental right to abortion continues to enjoy majority support on the Court, Scalia presumably would recognize the existence of the two compelling interests throughout pregnancy which the plurality identified.

Thus, as the trimester scheme no longer enjoys majority support on the Supreme Court, it may be considered *de facto* and *sub silentio* overruled. The law now recognizes the states' compelling interests in unborn life and maternal health throughout pregnancy.

E. *To the Extent Any Fundamental Abortion Right Is Recognized, Abortion Regulations Need No Longer Be Narrowly Tailored*

Justice O'Connor's rejection of the "narrowly tailored" standard for reviewing abortion laws is another *de facto* change in abortion law. *Roe*'s discussion of the standard of review for fundamental rights served as the foundation for a two-prong test for constitutionally reviewing abortion statutes. First, the state must show a compelling interest supporting the regulation of abortion and, second, the statute must be narrowly tailored to affect only the compelling interest.³²

Justice O'Connor, however, wrote in her *Akron* dissent:

The Court has never required that state regulation that burdens the abortion decision be 'narrowly drawn' to express only the relevant state interest. In *Roe*, the Court mentioned 'narrowly drawn' legislative enactments, but the Court never actually adopted this standard in the *Roe* analysis. In its decision today, the Court fully endorses the *Roe* requirement that a burdensome health regulation, or as the Court appears to call it, a 'significant obstacle,' be 'reasonably related' to the state compelling interest. The Court recognizes that '[a] State necessarily must have latitude in adopting regulations of general applicability in this sensitive area.'³³

This reasonably related test presents less of an obstacle to creating meaningful abortion regulations than the narrowly tailored test did. Justice O'Connor's *Akron* discussion of how the provisions in that case could be upheld under this alternative test clearly demon-

³¹ See *id.* at 3064 (Scalia, J., concurring in part).

³² See *Roe*, 410 U.S. at 155.

³³ *Akron*, 462 U.S. at 467 n.11 (1983) (O'Connor, J., dissenting) (citations omitted).

strates this point. Thus, the generally accepted second prong of the "compelling interest" standard of review for abortion cases is now without force.

II. WEBSTER DOES NOT PORTEND DIRE CONSEQUENCES FOR OTHER SOCIETAL INTERESTS NOT LOGICALLY CONNECTED TO ABORTION

Claiming that the fundamental abortion right declared in *Roe v. Wade*³⁴ cannot fall alone, abortion advocates have raised alarmist cries that various other rights are inextricably intertwined with the abortion right and rise or fall with it. These concerns are unfounded and must be recognized for what they are: an effort to prop up the moribund analysis of *Roe*.

A. *The Abortion Right Can Fall Alone*

The Supreme Court's handiwork in *Roe* wrought a vast aberration in every instance where law touches abortion.³⁵ Consequently, constitutional scholars have criticized *Roe* intensely,³⁶ and have suggested alternative constitutional bases for an abortion right to remedy *Roe*'s fatally flawed substantive due process analysis.³⁷ These efforts are unpersuasive.³⁸ With Supreme Court support for the abortion right eroding, and as the nation moves further from both the unique historical context which gave rise to *Roe* and the historical accident of Supreme Court support for such an opinion,³⁹ abortion partisans have turned to more emotional, alarmist assertions to garner support for the abortion right. Three arguments in particular have been asserted: 1) that the right to contraception is at risk if the abortion right falls; 2) that civil rights in general are endangered if the Court rejects the unenumerated abortion right; and 3) that recognition of the rights the unborn in any fashion will result in unreasonable intrusions into the lives of pregnant women.

³⁴ 410 U.S. 113 (1973).

³⁵ See generally Bopp & Coleson, *supra* note 5 (showing the anomalies of the special, absolutist rules applied in abortion law as compared to the normal rules applied in constitutional law, tort law, wrongful death law, criminal law, equity, medical regulation, and rules of proper adjudication and procedure).

³⁶ See *id.* at 185-92.

³⁷ See *id.* at 218-45; Robertson, *Gestational Burdens*, *supra* note 4.

³⁸ See Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of Roe v. Wade?*, 15 J. CONTEMP. L. 131 (1989) (surveying the alternative bases asserted for a right to abortion and demonstrating the flaws of each).

³⁹ See *id.* at 173.

These three arguments employed to shore up eroding support for a constitutional right to abortion are flawed.

1. Contraception and Abortion are Different

At oral arguments in *Webster*, Frank Susman, attorney for Planned Parenthood, argued that abortion is a fundamental right because it is "deeply rooted in this nation's history and tradition."⁴⁰ Chief Justice Rehnquist responded, "[S]urely abortion was regulated by the states in the 19th century and in the 20th century?" He continued, "If you say there is a deeply rooted tradition of freedom in this area, that suggests that there had been no legislative intervention to me. . . . [T]hat simply is not the fact."⁴¹

This colloquy demonstrates the problem faced by those attempting to paint abortion as a fundamental right. There simply is no defensible way to argue that the right to have an abortion is deeply rooted in our nation's history and tradition. The history of abortion regulation set forth in the *Roe* opinion has been thoroughly discredited by subsequent scholarship.⁴²

To avoid this problem, Mr. Susman sought at oral argument to create a new right of procreative choice, which purportedly encompassed both the abortion and contraceptive right. This broader right of procreative choice, Mr. Susman asserted, was the one to be tested by the history and traditions of our nation and found to be fundamental.

There are three reasons to reject this effort to take advantage of the broader constitutional and popular support for contraceptive rights in order to protect the abortion right. First, abortion and contraception are logically and morally separable and, therefore, should be treated separately.⁴³ Second, a right of procreative choice is over-

⁴⁰ *Transcript of Oral Arguments Before Court on Abortion Case*, N.Y. Times, April 27, 1989, at B13, col. 2 [hereinafter *Transcript of Oral Arguments*]. For a more complete discussion of the subject in this subsection, see Bopp, *The Elusive Abortion Right*, THE NAT'L L.J., June 12, 1989, at 13, col. 1.

⁴¹ *Transcript of Oral Arguments*, *supra* note 40, at B13, col. 3.

⁴² See Bopp & Coleson, *supra* note 5, at 237-40 (authorities cited therein). For the most current exposition of the history of abortion regulation in English and American common and statutory law, see Brief Amicus Curiae of the American Academy of Medical Ethics, *Minnesota v. Hodgson*, 853 F.2d 1452 (8th Cir. 1988) (en banc), *cert. granted*, 57 U.S.L.W. 3859 (U.S. July 3, 1989) (No. 88-1309) (demonstrating that *Roe* broke with long-established traditions and values of the common law).

⁴³ For a fuller discussion of this point, including Justice Scalia's response, see Bopp, *supra* note 40, at 14.

broad, encompassing activities beyond contraception and abortion (e.g., incest and statutory rape) that historically have been left to the states' police powers for regulation.⁴⁴ Third, the fundamental rights test set forth by the Supreme Court in *Bowers v. Hardwick*⁴⁵ mandates that a proposed right be as narrowly defined as possible before being subjected to the history and tradition test for fundamentality.⁴⁶ As a result, the Court must address the narrow right to abortion and not the broad right of procreative choice.⁴⁷

It is untenable to argue that a contraceptive right will fall if the abortion right falls, because the two are legally and logically distinct. The Court recognized contraceptive rights eight years before abortion rights existed.⁴⁸ Even Planned Parenthood explained the difference in its 1963 pamphlet, *Plan Your Children For Health and Happiness*, which declared: "An abortion kills the life of a baby after it has begun. . . . Birth control merely postpones the beginning of life."⁴⁹ Now Planned Parenthood, through Frank Susman, argues that some substances used to prevent conception (the meaning of the term "contraception") actually act as abortifacients so that the two are now inseparable. Justice Scalia, at *Webster* oral arguments, saw the fallacy of this merging of two distinct concepts and asked why a court that can create trimester schemes cannot separate abortion from contraception.

In fact, in the Court's last term, all nine Justices expressly or impliedly reaffirmed *Griswold v. Connecticut*,⁵⁰ which extended constitutional protection to contraceptive use. In *Webster*, the plurality opinion took great pains to distinguish the analysis and holding of *Griswold*, which they approved, from that of *Roe*, which they disapproved.⁵¹ Justices O'Connor,⁵² Blackmun, Brennan, Marshall,⁵³ and

⁴⁴ See *id.*

⁴⁵ 478 U.S. 186 (1986).

⁴⁶ See Bopp, *supra* note 40, at 14.

⁴⁷ Cf. *Bowers*, 478 U.S. 186 (rejecting the abstract formulation of a right to do what one chooses in one's home in favor of the narrow formulation of a right to engage in homosexual sodomy); *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2343, 2345 (1989) (rejecting Justice Brennan's proposed formulation of "the freedom not to conform" in favor of the more narrow right of "the natural father to assert parental rights over a child born into a woman's existing marriage with another man").

⁴⁸ See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

⁴⁹ PLANNED PARENTHOOD-WORLD POPULATION, *PLAN YOUR CHILDREN FOR HEALTH AND HAPPINESS* (1963).

⁵⁰ 381 U.S. 485 (1965).

⁵¹ See *Webster*, 109 S. Ct. at 3057-58.

⁵² See *id.* at 3059 (O'Connor, J., concurring in part).

⁵³ See *id.* at 3073 (Blackmun, J., dissenting).

Stevens⁵⁴ also approved *Griswold* in *Webster*. Similarly, in *Michael H. v. Gerald D.*,⁵⁵ Justice Scalia, who would have overturned *Roe* in *Webster*,⁵⁶ expressly noted that *Griswold* was consistent with his mode of analysis.⁵⁷

Thus, contraceptive rights are not inextricably entwined with abortion rights, and the demise of *Roe* does not jeopardize true⁵⁸ contraceptives.⁵⁹

2. Civil Rights are Not Threatened.

Likewise, *Roe*'s demise does not jeopardize civil rights, because using an historical approach to identify fundamental rights does not endanger civil rights. The debate over slavery nearly split the Constitutional convention. Moreover, the post-Civil War amendments explicitly prohibited slavery and racial discrimination.⁶⁰ Thus, the Supreme Court had firm constitutional footing when it spoke against racial discrimination in *Brown v. Board of Education*.⁶¹ The *Brown* Court not only followed the post-Civil War amendments, but also "the majestic . . . formula: the equal protection of the laws."⁶²

By contrast, there was universal condemnation for abortion when the framers drafted and adopted the Constitution,⁶³ and there

⁵⁴ See *id.* at 3081 (Stevens, J., concurring in part and dissenting in part).

⁵⁵ 109 S. Ct. 2333 (1989).

⁵⁶ See *Webster*, 109 S. Ct. at 3064 (Scalia, J., concurring).

⁵⁷ See *Michael H.*, 109 S. Ct. at 2344 n.6. Justices O'Connor and Kennedy also expressed approval of *Griswold* in *Michael H.* See *id.* at 2346-47 (O'Connor, J., concurring in part).

⁵⁸ Even those substances with a primary effect of contraception but a potential secondary effect of preventing implantation of the fertilized ovum are not in danger from the demise of *Roe*. Women taking these drugs to prevent contraception would lack the intent to induce an abortion that criminal abortion laws require. Furthermore, in a post-*Roe* world, *Griswold* will also protect contraceptives which may act as abortifacients. Any regulation to prevent the drugs from being used as abortifacients must be narrowly tailored to effectuate only the state's interest in protecting unborn life.

⁵⁹ Some pro-*Roe* legal scholars have also noted the Court's careful attempts to distinguish abortion from contraception. See Robertson, *The Future of Early Abortion*, *supra* note 4, at 73, 75.

⁶⁰ See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 68 (1873).

⁶¹ 347 U.S. 483, 490-91 (1954).

⁶² Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 14 (1971). That Bork should support the Court's opinion in *Brown* may come as a surprise to some because alarmist tactics assailed him and painted him as the arch-nemesis of civil rights. Neither sound principles of jurisprudence nor the demise of an illegitimate abortion right threaten the rights of racial minorities, despite representations to the contrary.

⁶³ See, e.g., Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U.

is still no clear national sentiment in favor of abortion. As a result, the text and history of our Constitution do not support an abortion right, but the post-Civil War amendments and the Constitution's history do substantiate racial minorities' right to equal protection. Therefore, the demise of abortion rights poses no threat to civil rights in general.

3. Pregnant Women Will Retain Reasonable Liberty Beyond the Abortion Context.

The final alarm that abortion proponents raise is that the Supreme Court's approval of the Missouri Preamble⁶⁴ and the demise of *Roe* will restrict pregnant women's liberty. This claim is as unfounded as the rest.

Abortion advocates see no middle way, only the extremes. Either every case is decided in favor of the mother or every case is

PITT. L. REV. 359, 389 & n.195 (1979) (noting that the more populous states had prohibited abortion by the start of the Civil War); Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395, 435 (1961) (identifying Connecticut as the first state to criminalize abortion by statute, in 1821); Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 33 (1985) (noting that thirty of the thirty-seven states had anti-abortion statutes by the year of the fourteenth amendment).

⁶⁴ The Missouri preamble reads:

1.205 LIFE BEGINS AT CONCEPTION- UNBORN CHILD DEFINED- FAILURE TO PROVIDE PRENATAL CARE, NO CAUSE OF ACTION FOR

1. The General Assembly of this state finds that:

(1) The life of each human being begins at conception;

(2) Unborn children have protectable interests in life, health, and well-being;

(3) The natural parents of unborn children have protectable interests in life, health, and well-being of their unborn child.

2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and provisions of this state.

3. As used in this section, the term "UNBORN CHILDREN" or "UNBORN CHILD" shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.

4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

Mo. ANN. STAT. § 1.205 (Vernon 1989).

resolved in favor of the unborn child. Yet Missouri's Preamble is not the first recognition of the unborn's rights, and the courts previously have balanced the rights of both the mother and her child when they conflict.

Some believe that recognizing the unborn's rights will result in extreme restrictions on pregnant women's liberty. These people argue that we are on a slippery slope.⁶⁵ They view the matter as one in which the rights of only one party may be considered so that, in their view, any consideration of fetal rights terminates maternal rights. They project onto pro-life advocates this same mindset, claiming that pro-life proponents believe that the unborn child's rights must always prevail. Such a view, however, is not well-founded.

B. *Protection of Fetal Rights Is Nothing New*

Courts have long recognized fetal rights in several areas of the law, including the criminal, property, tort, wrongful death, and equity realms, increasingly so with the rise of modern scientific understanding of prenatal development and the obligation to prevent handicaps for those who will be born.⁶⁶

⁶⁵ See, e.g., Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CALIF. L. REV. 1951, 1994 (1986) ("[C]ourt ordered cesareans may start us down that 'slippery slope' toward controlling and coercing pregnant women in the name of fetal well-being"); Gallagher, *Prenatal Invasions and Interventions: What's Wrong With Fetal Rights*, 10 HARV. WOMEN'S L.J. 9, 45 (1987) ("The slippery slope" of the threats posed by the fetal rights proposals are no longer hypothetical.').

One commentator observes that even though "claims of slippery slope effect will not necessarily be invalid," they may be "wildly exaggerated." He adds that "slippery slope claims deserve to be viewed skeptically, and the proponent of such a claim must be expected to provide the necessary empirical support." Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 382 (1985).

⁶⁶ See, e.g., Bopp & Coleson, *supra* note 5, at 246-83; Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME L. REV. 349 (1971) (examining the right of the unborn in the context of property, torts, equity, criminal, and abortion law). As many commentators have noted, *Roe's* declaration that the unborn have no rights of personhood under the fourteenth amendment has been given a broad reading which is unwarranted; *Roe* did not eliminate the rights of the unborn in other contexts. See Baron, "If You Prick Us, Do We Not Bleed?," *Of Shylock, Fetuses, and the Concept of Person in the Law*, 11 LAW, MED. & HEALTH CARE 52, 56 (1983) ("[T]he law has been largely willing to confer personhood upon the unborn when solid policy considerations have suggested that course."); Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 DUQ. L. REV. 1, 15 (1984); Parness & Pritchard, *To Be Or Not to Be: Protecting the Unborn Potentiality of Life*, 51 U. CIN. L. REV. 257, 258 (1982); Note, *Unborn Child: Can You Be Protected?*, 22 U. RICH. L. REV. 285, 287 (1988) (*Roe* does not necessarily imply that the state may not grant legal recognition to the unborn in non-fourteenth amendment cases).

Courts have even required mothers to perform or permit certain actions for the protection of the unborn and her own health. With advances in fetal therapy⁶⁷ and the increasing recognition of prenatal torts, the invocation of courts' equitable powers to protect the unborn was a logical next step. Moreover, the practice of protecting the unborn from preventable handicaps antedates *Roe* and despite some courts' confusion,⁶⁸ *Roe*⁶⁹ should not affect it.

⁶⁷ See, e.g., Lenow, *The Fetus as a Patient: Emerging Rights as a Person?*, 9 AM. J.L. & MED. 1, 28 (1983) (stating that "[t]he advent of fetal surgery techniques requires parents, physicians and the legal system to confront the question of how to determine the rights of the unborn fetal patient").

⁶⁸ Some courts have misapplied *Roe*'s viability line and have refused to protect pre-viable children. In fact, a majority of courts that have intervened have done so on behalf of the "viable" fetus. One notable exception is *Taft v. Taft*, 388 Mass. 331, 446 N.E.2d 395 (1983), where the court left open the possibility that "in some situations . . . the State's interest . . . might be sufficiently compelling" to order a pregnant woman to have medical treatment to protect a pre-viable fetus. *Id.* at 334, 446 N.E.2d at 397. However, with a majority of the Justices on the Supreme Court recognizing that the states have a compelling interest in unborn life throughout pregnancy, the viable/pre-viable distinction should be eliminated. If protection of the unborn was proper under *Roe*, it is *a fortiori* proper after the demise of *Roe*.

⁶⁹ *Roe*'s holding that the unborn are not fourteenth amendment persons is inapplicable in any other context. See Bopp & Coleson, *supra* note 5, at 253-61. In fact, *Roe* has been used to support intervention on behalf of the unborn where the mother chooses not to abort because of its recognition of an "important and legitimate interest in protecting the potentiality of human life" throughout pregnancy. *Roe*, 410 U.S. at 162. *Roe* may, therefore, be viewed as a legitimization of fetal rights and state authority to protect them. See, e.g., Dougherty, *The Right to Begin Life with Sound Body and Mind: Fetal Patients and Conflicts with Their Mothers*, 63 U. DET. L. REV. 89, 104 (1985) ("[T]he other side of *Roe* is the establishment of the state's compelling interest in protecting viable fetal life"); Myers, *supra* note 66, at 18 ("*Roe* makes clear that the state has a substantial authority to protect fetal life"); Note, *supra* note 66, at 288 (*Roe* "legitimized the state's interest in protecting the potential life of the unborn").

Myers extends the logic of *Roe* to its inescapable conclusion:

The state's interest in viable fetal life permits it to forbid abortion, an act designed to extinguish life. It follows from this that the state is empowered to proscribe other acts calculated or likely to lead to the same result. Furthermore, since the interest in preservation of fetal life authorizes intervention to prevent destructive acts, it should also authorize limited compulsion of action which is necessary to preserve fetal life. Since a failure to act can as surely lead to frustration of the state's interest as an affirmative act, the underlying interest must reach both cases. . . . Since the state may proscribe acts leading to fetal death, and may, as a result, require birth, its interest in potential life should extend to the protection of the quality of life.

Myers, *supra* note 66, at 18-19 (citations omitted). One commentator has even suggested that as viability is pushed back, "*Roe* soon may become a 'right-to-life' decision." Rhoden, *The New Neonatal Dilemma: Live Births from Late Abortions*, 72 GEO. L.J. 1451, 1454 (1984).

Several examples demonstrate ways in which the courts have acted to protect the unborn from harm caused by actions of their mothers. In *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,⁷⁰ the New Jersey Supreme Court granted an order compelling blood transfusions, despite the mother's religious convictions, to save her 32-week-old unborn child. The court observed that without the transfusions "both she [the mother] and the unborn child will die,"⁷¹ and held that the unborn child's right to life outweighed the mother's religious beliefs.⁷²

The courts also have allowed more intrusive procedures like caesarian sections. In 1981, the Georgia Supreme Court granted an order compelling a caesarian section over a woman's religious objections because a vaginal delivery endangered both her life and the child's.⁷³ In other cases, reported⁷⁴ and unreported,⁷⁵ the trend toward court ordered caesarian section to protect the unborn from harm continues.

Finally, courts have also acted to protect the unborn from a class of maternal actions which will lead to serious fetal damage. The concept of preventing avoidable prenatal injuries has strong support. In

⁷⁰ 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964).

⁷¹ *Id.* at 423, 201 A.2d at 538.

⁷² See *id.* at 424, 201 A.2d at 538; see also *Crouse Irving Memorial Hosp., Inc. v. Paddock*, 127 Misc. 2d 101, 485 N.Y.S.2d 443 (N.Y. Sup. Ct. 1985) (ordering blood transfusions to save a mother and child over the mother and father's religious objections); *In Re Application of Jamaica Hosp.*, 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (N.Y. Sup. Ct. 1985) (ordering blood transfusion to save an 18-week-old fetus over maternal religious objections).

⁷³ See *Jefferson v. Griffin Spalding County Hosp. Auth.*, 247 Ga. 86, 274 S.E.2d 457 (1981). The mother in *Jefferson* had a condition known as complete placenta previa (blockage of the birth canal by the placenta). Evidence before the court revealed a vaginal birth would pose a 50% risk of death to the mother and a 99% risk for the child. Prior to the caesarian section, the condition corrected itself, which is rare, and the woman delivered normally. See also *Lenow*, *supra* note 67, at 21 n.123.

⁷⁴ See, e.g., *In re A.C.*, 533 A.2d 611, 611 (D.C. 1987), *vacated and reh'g en banc granted*, 539 A.2d 203 (D.C. 1988) (holding that a hospital could perform a caesarian section on a terminally ill woman despite her objections).

⁷⁵ See, e.g., *Jurow & Paul, Cesarean Delivery for Fetal Distress Without Maternal Consent*, 63 OBSTET. & GYN. 596 (1984) (discussing a case where doctors delivered a fetally distressed infant by cesarian section against the mother's wishes and without a court order); *Kolder, Gallagher & Parsons, Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1197 (1987) (noting a national survey counting instances of court appointed obstetrical procedures in cases of women refusing treatment necessary to preserve the health of the fetus); *Watson & Selgestad, Fetal Versus Maternal Rights: Medical and Legal Perspectives*, 58 AM. J. OBSTET. & GYN. 209, 212 (1981) (discussing *In re Unborn Baby Kenner*, No. 79JN83 (Col. Juv. Ct., Mar. 6, 1979), where doctors performed a court ordered caesarian section to safeguard an unborn infant's life in spite of the mother's objections).

1960, the New Jersey Supreme Court declared "that a child has a legal right to begin life with a sound mind and body."⁷⁶ With the rapid advance of medical technology, certain prenatal ailments have become treatable in utero⁷⁷ and the fetus has become the "second patient."⁷⁸ While some commentators have opposed court protection of the unborn in such a situation,⁷⁹ there is a shift in attitudes which favors balancing fetal rights with the mother's.⁸⁰ This change appears even among pro-choice advocates⁸¹ and, as noted, the courts have already engaged in such balancing.

This action is appropriate.⁸² It makes no sense that a person should endure lifetime suffering because her mother cared nothing for the welfare of her child. The cases clearly show that courts will regulate activities that pose a substantial risk of significant harm to the unborn child, provided that the court can reasonably accommodate the mother's health, liberty, and bodily integrity interests.

The extreme results predicted by those asserting an absolute

⁷⁶ *Smith v. Brennan*, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960).

⁷⁷ See Harrison, Golbus & Filly, *Management of the Fetus With a Correctable Congenital Defect*, 246 J.A.M.A. 774, 776 (1981).

⁷⁸ WILLIAMS OBSTETRICS vii (J. Pritchard & P. MacDonald eds. 16th ed. 1980); See also Kolder, Gallagher & Parsons, *supra* note 75, at 1194 (noting that gynecologists and obstetricians take into account the therapeutic interests of the fetus when faced with a mother who refuses fetal therapy).

⁷⁹ See, e.g., Gallagher, *supra* note 65.

⁸⁰ Compare Fletcher, *The Fetus as Patient: Ethical Issues*, 246 J.A.M.A. 772, 772 (1981) ("As long as the fetus is not separate from the mother, choices about treatment ought to be made only with her informed consent.") with Fletcher, *Ethical Considerations in and Beyond Experimental Fetal Therapy*, 9 SEMINARS IN PERINATOLOGY 130, 134 (1985) ("If the intervention may serve the future infant [with minimal maternal intrusion], the refusal of the mother . . . should not be a final barrier to [treatment].").

⁸¹ See Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405 (1983). Professor Robertson states: "The maternal-fetal conflicts that arise in managing pregnancy do not involve the woman's right to procreate, but rather her right to bodily integrity in the course of procreating. . . . Once she decides to forego abortion and the state chooses to protect the fetus, the woman loses the liberty to act in ways that would adversely affect the fetus." *Id.* at 437. See also the comments of Harvard Law School Professor Alan Dershowitz, disputing his colleague Lawrence Tribe, in Dershowitz, *Pro-choice argument goes too far*, Boston Herald, May 16, 1989, at 27, col. 1 ("Once a woman has made the decision to bear a child, the rights of the child should be taken into consideration. . . . [I]t does not follow, as a matter of constitutionality, principle of common sense, that a woman has the right to inflict a lifetime of suffering on her future child, simply in order to satisfy a momentary whim for a quick fix.").

⁸² Even John Stuart Mill, that ubiquitous authority in treatises on bioethics and medico-legal matters, wrote that the maximum individual freedom he championed should be limited where one's rights collide with the rights of another. See J. MILL, *ON LIBERTY* 69-70 (G. Himmelfarb ed. 1985).

right for the woman⁸³ are not evident in the cases. *Stallman v. Youngquist*⁸⁴ explodes the myth that the courts will allow either children to sue their mothers for negligence, or others to sue for miscarriage. In *Stallman*, the Illinois Supreme Court held that an unborn child injured in an automobile accident, but subsequently borne alive, could not sue her mother.

Thus, although courts will consider the right of a child to be born with a sound mind and body, they show no indication of disregarding the rights and interests of the mother as well. The notion that recognizing fetal rights portends police raids to remove pregnant women from the ski slopes, mandatory genetic testing, or even forced abortions is not borne out by reality.⁸⁵

C. *How the Balancing May be Improved*

Examining the cases demonstrates that to this point, the courts have engaged in an ad hoc analysis. A rule to guide judicial intervention, however, may be derived.

Because the rights and interests of the mother and child are inextricably intertwined prior to birth, the analysis considers both and excludes neither. This principle is foundational in our rule-of-law regime. One's rights are properly limited where they interfere with those of another. Abandoning this egalitarian approach would return us to a class system and grossly undercut our principle of equal justice under the law.

A balancing approach would protect pregnant women's rights just as it protects rights in other areas of law. When we prohibit yelling "Fire!" in a crowded theater, we do not take away the right to free speech. Rather, we curtail the right because it is outweighed by rights and interests of others, found to be more weighty in that case. Therefore, the only equitable approach to considering the rights and interests of both the mother and her child is to balance them.

The result is a spectrum of instances in which at one end, the

⁸³ See Interview with Laurence Tribe, *Morning Edition*, National Public Radio, July 14, 1989, quoted in DO PREGNANT WOMEN LOSE LEGAL RIGHTS?, CONGRESSIONAL QUARTERLY'S EDITORIAL RESEARCH REPORTS 44 (July 28, 1989) (positing that women might be punished for athletic activity).

⁸⁴ 531 N.E.2d 355 (Ill. 1988).

⁸⁵ See DO PREGNANT WOMEN LOSE LEGAL RIGHTS?, *supra* note 83, at 422-24 (quoting certain persons positing these two extremes as legitimate risks of recognizing fetal rights).

interests of the mother outweigh those of the unborn child, and at the other, the unborn child must be protected.⁸⁶

A two-pronged analysis is appropriate for determining when and how the court should act when a conflict of rights occurs.⁸⁷

The first prong of the test may be stated thus: The court may act if the pregnant woman is engaging in knowing and intentional behavior which poses a substantial risk of significant harm to her unborn child, provided that the woman's liberty, health, and bodily integrity interests may reasonably be accommodated.

The purpose of this first prong is twofold. First, the court must examine the risk of harm to the unborn child to determine whether protective action is warranted. Second, if the risk of harm is serious enough to warrant protection, then the court must determine whether this protection can be achieved with a reasonable accommodation of the mother's interests in liberty, bodily integrity, and health. If both cannot be met, a court should not act.

The risk of harm is determined by considering both the substantiality of the risk and the significance of the harm. Where either is very low, there will be a low risk of harm.

For example, activities such as jaywalking pose a risk of significant harm to the unborn child, but the risk itself is slight. Therefore, a court should not intervene. At the other end of the spectrum would be activities such as chronic and severe substance abuse, posing near-certain risk of significant harm.⁸⁸ In such situations, a court

⁸⁶ As a preliminary matter, a court's jurisdiction over the mother and her unborn child must attach from some source. For example, a state statute prohibiting child abuse, or probation from a pre-existing criminal conviction could provide the basis for the court's power over the mother. Further, the state's power could only be properly exercised after proving the facts to be used in balancing these rights in a particular case, pursuant to proper procedures.

⁸⁷ The following test assumes a high degree of medical certainty and efficacy for any proposed procedure when medical treatment is sought against the mother's will. There are also other additional considerations:

State intervention to protect fetal health should be considered only when (1) there is a high likelihood of serious fetal disease, (2) there is a high level of diagnostic and prognostic accuracy, (3) there is strong scientific evidence that the proposed treatment is efficacious, (4) deferring intervention until after birth could cause significant further damage, (5) the risk to the mother is minimal, (6) interference with maternal privacy is not egregious, and (7) attempts at persuasion, education, and obtaining informed consent have been exhausted.

Landwirth, *Fetal Abuse and Neglect: An Emerging Controversy*, 79 PEDIATRICS 508, 513 (1987).

⁸⁸ Where the well-being of the mother is also at risk, the state has an additional interest at stake, especially if the harmful activity is criminal.

may act provided that it may make a reasonable accommodation of the mother's interests.

A reasonable accommodation of the mother's interests must consider the risk to the child together with the risk to and intrusiveness upon the mother that the protective procedure or action requires. A court will determine the degree of risk to and intrusiveness upon the mother by considering the risk to the mother's health, the physical discomfort and intrusiveness of any procedure, and the limitation on her liberty. Where there is a very high risk of harm to or intrusiveness upon the mother, no risk of harm to the child would justify state protective action for the child. Such would be the case where the mother's life is at risk from the protective action. Where the risk of harm to or intrusiveness upon the mother is low and the risk of harm to the child is high, however, protective action would be appropriate.

Where the state is justified in acting, it should act within the guidelines of the second prong of the test: in acting, the state must utilize the least restrictive means necessary to protect the life and health of the unborn.

Because the purpose of enforcement is protective, not punitive, *ex post facto* penalties would have little value. By the time penalties could be imposed, the damage to the unborn would already have been done. For example, the threat of additional penalties will not deter a woman who is already abusing drugs and engaging in other illegal activity to support her habit, and they will not protect her unborn child.

Further, court fashioned remedies protecting unborn life should be the most minimally intrusive possible. If periodic testing and counseling for substance abuse, in the context of probation for prior abuse, would be effective, then incarceration should be avoided. Other "least restrictive" means of furthering the state's interest in protecting the unborn from harm might include required warnings on alcoholic beverages and public education campaigns about the dangers drugs and alcohol pose to unborn children.

In the end, though, there is no logical or legal reason why a state may not go beyond public education measures to prevent activities which impose substantial risk of significant harm on the unborn. The state, however, must do so in a way that honors the interest of the woman in liberty, health, and bodily integrity.

CONCLUSION

Webster has wrought a substantial de facto change in abortion law and forecasts an express, formal reconsideration and overruling of *Roe*. This change is wholly salutary, bringing abortion law into greater conformity with the rest of the law by recognizing the rights of the unborn as well as those of women. Moreover, *Webster* does not threaten civil or contraceptive rights.

Further, *Webster* will not place unreasonable burdens on women's rights. Courts, before and after *Roe*, have acted to protect the unborn's life and health when reasonable accommodation of the pregnant woman's health, bodily integrity, and liberty interest was possible. Done properly, such orders impose no burden on any woman that is not justified by the fact that her unborn child's destiny is inextricably intertwined with her own.

